UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DENNIS MARTIN, as Personal Representative of the Estate of PAUL F. MARTIN, Plaintiff, v. CAPE FEAR, INC., Defendant.	C.A. No. 99-10944-GAO
SUSAN ALLEN, as Personal Representative of the Estate of STEVEN M. REEVES, Plaintiff, v. CAPE FEAR, INC., Defendant.	C.A. No. 99-10960-GAO

RULINGS ON POST-JUDGMENT MOTIONS
May 4, 2004

O'TOOLE, D.J.

Following the entry of judgment, the parties have filed multiple post-judgment motions. This Order sets forth the Court's rulings on these motions.

1. Motions Pertaining to the Reduction of the Jury Award to Account for Comparative Negligence. The plaintiffs in the respective cases have moved pursuant to Fed. R. Civ. P. 59(e) to amend the judgment to omit any reduction in the amount awarded by the jury, contending that such

a reduction in these cases is contrary to 45 U.S.C. § 53, applicable in Jones Act cases by reason of 46 U.S.C. app. § 688(a).

> Section 53 of the FELA, incorporated into the Jones Act, provides, in pertinent part:
>
> [N]o such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 53. The jury found that the F/V CAPE FEAR was in violation of applicable Coast Guard regulations related to safety instructions and drills or survival equipment, and that the defendant had not established that the violations could not have been the cause of injury or death to Steven Reeves and Paul Martin. The plaintiffs claim this finding eliminates the defense of contributory negligence on account of § 53. The defendant says § 53 is inapplicable because the F/V CAPE FEAR was not a "common carrier," as that term is used in the statute.[1]

Generally, a common carrier is one who holds himself out to the general public as engaged in the business of marine transport for compensation, and whose services are generally available to those who wish to employ him and are not limited to carriage for a particular party or parties. See 2 Thomas J. Schoenbaum, Admiralty and Maritime Law § 10.3 (3d ed. 2001); see also Kieronski v. Wyandotte Terminal R.R., Co., 806 F.2d 107, 108 (6th Cir. 1986) (in-plant rail system not a "common carrier"); Aho v. Erie Mining Co., 466 F.2d 539, 540-41 (8th Cir. 1972) (mining company's rail system, which carried only products for the company and its contractors, was not a "common carrier"). The Jones Act does not define who is a "common carrier" but other shipping

[1] The issue of whether the vessel was a "common carrier" was the subject of the Defendant's Motion in Limine to Exclude the Application of § 53 of the FELA (doc. no. 32 in 99-10944), which was denied without prejudice on June 12, 2003.

statutes do. See, e.g., Shipping Act of 1984, 46 U.S.C. app. § 1702(6) ("'common carrier' means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation . . . ."). Under the traditional definition, Cape Fear, Inc. was not a common carrier, when the only cargo the F/V CAPE FEAR was carrying at the time of the accident was its own catch for sale to buyers on shore, and it does not appear that Cape Fear, Inc. was being paid for any transportation service or that the public had the right to use the F/V CAPE FEAR's services.

The Jones Act gives injured seamen the benefit of the extension of common law remedies provided to railroad workers by the FELA. See Practico v. Portland Terminal Co., 783 F.2d 255, 263 (1st Cir. 1985). Surprisingly enough, after almost a century of litigation under the Jones Act, the question appears never to have been directly answered whether the FELA's "common carrier" limitation should be imported and applied in Jones Act wrongful death cases such as this.

The Supreme Court noted in Cox v. Roth:

> The Jones Act, in proving that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the F.E.L.A. must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting.

348 U.S. 207, 243-44 (1955). Decided cases tend to apply § 53 to Jones Act cases without any discussion of the "common carrier" language in the statute. See, e.g., Fuszek v. Royal King Fisheries, Inc., 98 F.3d 514 (9th Cir. 1996) (applying § 53 to injured Jones Act seaman aboard a factory trawler fishing for cod and reversing district court's decision to reduce seaman's damage award by 25% for comparative negligence).

The defendant argues that the Jones Act incorporates the FELA's rights and limitations. In railroad cases, the courts have consistently interpreted the FELA to limit the extended remedies to employees of common carriers. See, e.g., Kieronski, 806 F.2d at 110; Aho, 466 F.2d at 541. If the Jones Act's extension of remedies for seamen is to parallel the FELA's extension of remedies for railway workers, the defendant argues, the common carrier limitation should apply in Jones Act cases as well.

Section 688(a) did not import the provisions of § 53 verbatim, as if the language of the latter section had been copied into the Jones Act. If it had, it may have imported a distinction between seamen who are employees of common carriers and those who are not, just as § 53 distinguishes between railway workers who are employees of common carriers and those who are not. But the Jones Act language of importation is more oblique. After creating on behalf of injured seamen "an action for damages at law with the right of trial by jury," the Act goes on to provide that "in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." 46 U.S.C. app. § 688(a) (emphasis added). Section 53 "modif[ies] or extend[s] the common-law right or remedy" with respect to some railway workers (those employed by common carriers) but leaves the common law right and remedy untouched with respect to others. The "importation" language of § 688(a) can be sensibly read as meaning to apply to seamen only the "modif[ied] or extend[ed]" rights and remedies – that is, those accorded by § 53 to common carrier railway workers. Under this reading, what was "imported" into the Jones Act, then, was not § 53 in its entirety, including the common carrier/non-common carrier distinction, but only so much of § 53 as modified or extended available remedies. Such a reading, while perhaps not the only sensible one, is consistent with the policy of giving the Jones Act a liberal

construction in favor of seamen's rights. See Kernan v. American Dredging Co., 355 U.S. 426, 432 (1958) (The general congressional intent of the FELA and the Jones Act is to provide liberal recovery to injured railroad and shipping workers.).

This Court concludes that the rights and remedies created in favor of seamen by § 688(a) are available to all seamen, whether or not employed by a common carrier. Accordingly, because the jury's answers to special questions indicated that, in each case, the defendant's violation of Coast Guard regulations contributed to the decedent's death, contributory negligence on the part of the decedent cannot be taken account of to reduce the otherwise available recovery as awarded by the jury. In each case, the plaintiff's motion is granted, and an amended judgment shall issue reflecting the full award of damages without reduction for comparative negligence.

It follows that the defendant's motions to reflect further reductions on account of comparative negligence with respect to categories of damages are denied.

2. Motions for Judgment as a Matter of Law. The defendant has presented three motions for judgment as a matter of law under Fed. R. Civ. P. 50(b). In the Martin case, the defendant renews its motion for judgment as a matter of law as to the plaintiff's claim for pre-death pain and suffering on the grounds that the jury could not rationally infer from the evidence that Paul Martin endured conscious suffering prior to his death. To the contrary, however, the jury was entitled to weigh the evidence presented concerning the circumstances of the disaster, including evidence about the sequence of events leading to Martin's situation at the time the vessel capsized, and on that evidence a conclusion to award damages for pain and suffering was not irrational or unsupported. The motion is denied.

In the Allen case, the defendant renews its motion for judgment as a matter of law on the award of loss of support for Steven Reeves' son, Tyler, on the grounds that Robyn Lima's testimony did not present sufficient evidence from which a jury could have concluded that Steven Reeves provided support for Tyler. The Court instructed the jury that support may take the form of financial contributions or provisions for shelter, food, or services rendered, but not occasional gifts that are sporadic and not regular. Robyn Lima testified that Steven Reeves saw Tyler weekly for one or two days and would buy him food, clothing, toys and books. Though Steven Reeves apparently did not provide much support for his son, the defendant has not shown that the verdict cannot stand on the evidence presented. The motion is denied.

Also in the Allen case, the defendant renews its motion for judgment as a matter of law on Allen's claim for loss of nurture and guidance. The jury was not instructed to consider damages for loss of nurture and guidance and it was not part of the verdict. The motion is moot. To the extent it is not moot, it is denied.

In both cases, the plaintiffs have moved for the entry of judgment for them on the defendant's claim of contributory negligence. In light of the conclusion, above, that the damages awarded to the plaintiffs should not be reduced for contributory negligence, these motions are moot. To the extent that they are not moot, they are denied.

3. Taxation of Costs. The plaintiffs seek recovery under Fed. R. Civ. P. 54(d) for costs related to depositions, transcripts, service, witness and filing fees and airfare for their expert, Dr. Steinman, in the total amount of $13,286.08. The defendant objects to costs related to certain depositions, transcripts from the Coast Guard hearings and the limitation proceeding, and Dr. Steinman's airfare.

For the reasons advanced by the defendant in its opposition to the plaintiffs' bills of costs, the Court taxes costs of the depositions of Warren Alexander, David DuBois, Captain David Folsom, Dr. Michael Jacobs, Joseph Lemieux, Robyn Lima, and Dr. Alan Steinman, as they were introduced in evidence or used at trial in the examination of witnesses or otherwise. Also allowed are the costs of the written transcripts for the depositions of James Haley and Steven Novack, but not the costs of videotaping the depositions. See Miller v. Nat'l R.R. Passenger Corp., 157 F.R.D. 145, 145-46 (D. Mass. 1994). Costs of the depositions of Dennis Martin, Kim LaPlante, Mary Martin, Anthony Martin, Donna Reid, Susan Allen, Helen Best, and Dana Hewins are not allowed, as it appears these depositions were not introduced in evidence or used at trial and the plaintiffs have not shown that special circumstances exist to warrant recovery of such costs. See Templeman v. Chris Craft Corp., 770 F.2d 245, 249 (1st Cir. 1985).

The transcripts from the U.S. Coast Guard hearings and the limitation action will not be taxed for the reasons advanced by the defendant in its opposition–i.e. because they are transcripts from related proceedings.

The plaintiffs claim $977.20 for the cost of Dr. Steinman's airfare but they have not furnished any receipt or other evidence of actual cost, as required by 28 U.S.C. § 1821(c)(1). See Holmes v. Cessna Aircraft Co., 11 F.3d 63, 65 (5th Cir. 1994) (affidavit from trial counsel regarding witnesses' travel expenses was sufficient to meet the requirements of § 1821(c)(1)). Absent sufficient evidence to meet the requirements of § 1821(c)(1), the cost of Dr. Steinman's airfare should not be taxed.

The defendant does not oppose the listed costs for "Service & Witness Fee of Haley and Novack" for $350.25 and "Filing Fee[s]" of $300, which are allowed.

The plaintiffs are directed to forthwith file a revised, detailed bill of costs consistent with the Court's rulings herein. A receipt or other evidence of the actual cost of Dr. Steinman's airfare shall be included with the revised bill of costs, or recovery for such cost will be denied.

It is SO ORDERED.

May 4, 2004
DATE

\s\ George A. O'Toole, Jr.
DISTRICT JUDGE